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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/724,839	12/01/2003	Gregory Dean Sunvold	P147	2171

EXAMINER	
ISSAC, ROY P	

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1623	

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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/724,839	SUNVOLD ET AL.	
	<b>Examiner</b>	<b>Art Unit</b>	
	Roy P. Issac	1623	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 02 May 2007.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-63 is/are pending in the application.
- 4a) Of the above claim(s) 1-31 and 56-63 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 32-55 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)            | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | Paper No(s)/Mail Date. _____                                      |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>4/21/04; 5/18/05</u> .  | 6) <input type="checkbox"/> Other: _____                          |

**DETAILED ACTION**

This application does not claim priority to any foreign or domestic applications.

***Election/Restrictions***

Applicant's election with traverse of the invention of Group III, claims 32-55 drawn to the use of the composition of group I is acknowledged. The traversal is on the ground that the search for the method claims and composition claims would be co-extensive and would not place a burden on the examiner. However, the compositions herein including fructooligosaccharide and inulin are well known in the prior art and it is not clear how a search for those compounds or compositions comprising them would be coextensive. The search field for the group of compounds/compositions is non-coextensive with the search field for a method or a process of using the same. A reference to the compound herein would not necessarily be a reference to the method of making the same herein. The compounds/compositions and methods of preparation and use have separate consideration as to patentability. As such the restriction between groups I-III is deemed proper.

The examiner has required restriction between product and process claims. Where applicant elects claims directed to the product, and the product claims are subsequently found allowable, withdrawn process claims that depend from or otherwise require all the limitations of the allowable product claim will be considered for rejoinder. All claims directed to a nonelected process invention

Art Unit: 1623

must require all the limitations of an allowable product claim for that process invention to be rejoined.

In the event of rejoinder, the requirement for restriction between the product claims and the rejoined process claims will be withdrawn, and the rejoined process claims will be fully examined for patentability in accordance with 37 CFR 1.104. Thus, to be allowable, the rejoined claims must meet all criteria for patentability including the requirements of 35 U.S.C. 101, 102, 103 and 112. Until all claims to the elected product are found allowable, an otherwise proper restriction requirement between product claims and process claims may be maintained. Withdrawn process claims that are not commensurate in scope with an allowable product claim will not be rejoined. See MPEP § 821.04(b).

Additionally, in order to retain the right to rejoinder in accordance with the above policy, applicant is advised that the process claims should be amended during prosecution to require the limitations of the product claims. **Failure to do so may result in a loss of the right to rejoinder.** Further, note that the prohibition against double patenting rejections of 35 U.S.C. 121 does not apply where the restriction requirement is withdrawn by the examiner before the patent issues. See MPEP § 804.01.

The restriction requirement between Inventions I-III was deemed proper and is therefore made FINAL.

Claims 32-55 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected inventions, there being no

Art Unit: 1623

allowable generic or linking claim. Applicant timely traversed the restriction requirement in the reply filed on 02 May 2007.

Claims 32-55 will be examined on the merits herein.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 32-33, 35, 38-43, 46-48 and 51-55 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 9-20 of copending Application No. 10/725,251. Although the conflicting claims are not identical, they are not patentably distinct from each other because the instant application is directed to a method enhancing calcium

Art Unit: 1623

absorption, improving bone health, improving physical activity performance and combinations thereof by the administration of oligofructosaccharide comprising compositions to companion animals, and the '251 application is directed to a method of improving gastrointestinal health of a companion animal, improving fecal odor of the feces of the companion animal and combinations thereof comprising administering to the companion animal compositions comprising oligofructosaccharides. Note that, "improving physical activity performance" of a companion animal is considered to encompass "improving gastrointestinal health" of the companion animal.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claims 32-33 and 47-48 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 37-40 and 46-47 of copending Application No. 10/725,248. Although the conflicting claims are not identical, they are not patentably distinct from each other because the '248 application is directed to a method of selected from the group consisting of enhancing gastrointestinal health of a companion animal, reducing the risk of cancer in a companion animal and combinations thereof by administering a composition comprising fermentable fiber. One of the fermentable fiber claimed is fructooligosaccharide. Note that reducing the risk of cancer and enhancing the gastrointestinal health are considered to involve the "improving physical activity performance" as claimed herein. As such, claims 32-

Art Unit: 1623

33 and 47-48 are considered to read on claims 37-40 and 46-47 of the co-pending application.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 36-37, 44-45, and 49-50 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claims herein recites the phrases "the fructooligosaccharide comprises inulin" and "the fructooligosaccharide comprises chicory". Fructooligosaccharide in itself is a polymeric compound. It is not clear how a compound can contain another compound or another composition.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

Art Unit: 1623

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 32-37 and 47 are rejected under 35 U.S.C. 102(b) as being anticipated by Vickers et. al. (American Journal of Veterinary Research (AJVR) 62(4), 2001, 609-615; PTO-892).

Vickers et. al. teaches that the use of fructooligosaccharides (FOS) in canine diets acts as a colonic stimuli and has important physiologic and anatomic effects on the nutritional status of dogs. Inulin and chicory are disclosed as sources of fructooligosaccharide. (Page 609, Column 1, first paragraph; Page 610, Column 1, paragraph 5). Vickers disclose that the use of fermentable fiber blends decreases urinary excretion of nitrogen while increasing fecal excretion of nitrogen without compromising delivery of essential nutrients to the host. The repartitioning of nitrogen reduces the reliance on the kidneys for nitrogen disposal. (Page 614, Column 1, Paragraph 2). Consumption of FOS is reported to promote beneficial microflora which aid in the suppression of potentially pathogenic bacteria. (Page 609, Column 1, last paragraph). These effects are expected to improve the physical activity performance of a companion animal.

Claims 32-33, 47-48 and 51-53 are rejected under 35 U.S.C. 102(b) as being anticipated by Howard et. al. (Nutrition Research, 2000, 20(10), 1473-1484; PTO-892).

Howard et. al. discloses feeding dogs that contain fructooligosaccharides (FOS). (Abstract). The FOS used was Nutraflora at 1.5%. (Table 1, Page 1474,



Art Unit: 1623

and Page 1474, last paragraph). Note that Nutraflora is described in the instant specification as having 34% 1-kestose, 55% nystose and 10% 1F-beta-fructofuranosylnystose. (Specification, Page 4, second paragraph). Howard describes that the incorporation of fermentable fiber into diet has several beneficial effects including, reducing colonic histopathologies, beneficially altering the intestinal microflora and reducing blood urea and renal N excretion. (Page 1473, introduction). Howard discloses that dry matter intake was reduced with FOS containing diets. These effects are expected to improve the physical activity performance of a companion animal.

Claims 32, 33, 35 and 37 are rejected under 35 U.S.C. 102(b) as being anticipated by Sparks et. al. (American Journal of Veterinary Research, AJVR 59(4) 1998, 431-435; PTO-892).

Sparks et. al. discloses the use of FOS supplemented diets for cats to modify flora. FOS was substituted at a rate of 0.75% of the dry weight. (Page 431, Column 2, paragraph 4). The alternations in flora is considered to improve physical activity performance of cats.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been

Art Unit: 1623

obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 32-55 are rejected under 35 U.S.C. 103(a) as being unpatentable over Howard et. al. (Nutrition Research, 2000, 20(10), 1473-1484; PTO-892), in view of Roberfroid M. (Nutrition, 16, 2000, 677-679; PTO-892).

The disclosure of Howard et. al. is discussed above.

Howard does not expressly disclose the use of oligofructosaccharides for enhancing calcium absorption.

Roberfroid et. al. discloses that oligofructosaccharides can improve calcium bioavailability. (Page 678, Column 1, paragraph 3 to Column 2, Paragraph 1). Roberfroid discloses chicory as a source of fructooligosaccharide and inulin as one of the oligofructosaccharides present in chicory. (Page 677, Column 1, paragraph 1).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to enhance calcium absorption or to improve physical activity performances in companion animals by feeding with fructooligosaccharides derived from chicory or inulin or the commercially available Nutraflora because Roberfroid M as well as Howard et. al. discloses beneficial effects for the inclusion of FOS including increased calcium bioavailability and Howard discusses the use of fructooligosaccharides in companion animal diets.

One of ordinary skill in the art would have been motivated to use oligofructosaccharides in companion animal diets to enhance calcium absorption

Art Unit: 1623

or to improve physical activity performances in companion animals because Howard et. al. discloses beneficial effects in the use of fructooligosaccharides in companion animals and Roberfroid discloses that fructooligosaccharides are capable of improving calcium bioavailability.

Therefore, one of ordinary skill in the art would have reasonably expected that the use of oligofructosaccharides in companion animal diets would have resulted in beneficial effects.

Thus the claimed invention as a whole is clearly prima facie obvious over the combined teachings of the prior art.

No claim is allowed.


Any inquiry concerning this communication or earlier communications from the examiner should be directed to Roy P. Issac whose telephone number is 571-272-2674. The examiner can normally be reached on 9:00-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Shaojia Anna Jiang can be reached on 571-272-0627. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 1623

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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